



POLICE DEPARTMENT

February 19, 2009

MEMORANDUM FOR: Police Commissioner

Re: Lieutenant Aluthea Caviness
Tax Registry No. 915435
Police Service Area No. 6
Disciplinary Case No. 83825/08

Sergeant Arturo Muia
Tax Registry No. 926086
84 Precinct
Disciplinary Case No. 83826/08

The above-named members of the Department appeared before me on December 10, 2008, charged with the following:

Disciplinary Case No. 83825/08

1. Said Lieutenant Aluthea Caviness, while assigned to the 68 Precinct, while on-duty, at or about 2200 hours on September 26, 2006, in the vicinity of 8813 4th Avenue, Kings County, did wrongfully and without just cause abuse his authority as a member of the New York City Police Department, in that he authorized the arrest of an individual known to this Department.

P.G. 203-10, Page 1, Paragraph 4 – ABUSE OF AUTHORITY

Disciplinary Case No. 83826/08

1. Said Sergeant, Arturo Muia, while assigned to the 68 Precinct, while on-duty, at or about 2200 hours on September 26, 2006, in the vicinity of 8813 4th Avenue, Kings County, did wrongfully and without just cause abuse his authority as a member of the New York City Police Department, in that he arrested an individual known to this Department.

P.G. 203-10, Page 1, Paragraph 4 – ABUSE OF AUTHORITY

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The Department was represented by Mary Lynne Frey, Esq., Department Advocate's Office; Respondent Caviness was represented by Peter Brill, Esq.; and Respondent Muia was represented by Philip Mellea, Esq.

The Respondents, through their counsel, entered pleas of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 83825/08

Respondent Caviness is found Not Guilty.

Disciplinary Case No. 83826/08

Respondent Muia is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called El-Baraa Askar and Wisam Unnab as witnesses.

El-Baraa Askar

Askar indicated that he is 16 years old and that his birthday is November 25. He is in the 10th grade. On September 26, 2006 he believed that he was in the 8th grade at Ft. Hamilton High School. He indicated that he wants to be a "cop." He said he had a friendly relationship with police officers in his community.

Askar indicated that his father has filed a lawsuit in connection with what occurred on September 26, 2005.

On that day he was 13 years old. At about 10:00 p.m., he along with his cousin, his brother and two friends went to the 7-11 near his home in Brooklyn. He stated that he went there regularly and knew one of the workers named Alex, who still works there.

Askar went inside the store with his cousin and his brother's friend. The Respondents were in the store. Askar said, "I believe I had a Slurpee put on the counter and paid for my stuff." He acknowledged that he started speaking to Respondent Muia. He said that Respondent Muia was talking to the workers and he was scratching off a lottery ticket. Askar said, "I told him – I wasn't speaking directly. I was like this. I said, 'Can you order me a Philly cheese steak sandwich.'" Askar demonstrated that he was speaking as though he were using a microphone mounted on a shoulder strap and indicated that he said "order me a Philly cheese steak."

Askar stated that Respondent Muia asked him why he was being an "asshole" and then told him to "just get out of here." Askar testified that he responded by saying, "Let me pay for my stuff." He then went by the door to get money and "[w]hen going back in, my hand was grabbed, and put behind my back. I had one cuff and I was under arrest." He said there was no dialogue between him and either Respondent from the time he walked back into the store and the arrest. He was then taken outside where he said he was "smacked against the wall."

Askar denied making any physical gestures towards either Respondent. He stated that during his initial conversation with Respondent Muia he was about 2 or 3 feet away and that Respondent Caviness was within a few feet or closer.

Askar indicated that he is 5'10" tall now and that he was 5'7" at the time of the incident. He stated that he weighs 220 pounds now and that at the time of the incident he weighed "maybe 180."

On cross-examination Askar acknowledged that he did not know what he was basing his estimated weight two years ago on. He further agreed that it was possibly closer to 200 pounds. He indicated that he did not read the papers his father filled out on his behalf in the civil suit. He indicated that his brother was 14 years old at the time of the incident.

He agreed that not everyone came into the store and that only his cousin Wasim and his friend El-Hassan did. He indicated that he did not believe he had been suspended from school the day before the incident but he acknowledged that it was possible he had been.

He agreed that when he and the other two boys entered the store, he went directly to the Slurpee machine while "Wasim was making something and Hassan was getting something else." He did not see where he was. He agreed that he never had any prior interaction with the Respondents. He stated that he treated Respondent Muia with respect when he was pretending to speak into the police radio and told Respondent Muia to order him a Philly cheese steak. He said it was "joking around" and "I wasn't looking for him to order it." He said that Respondent Muia was talking to the guy behind the counter and that he was talking to him too.

Askar acknowledged that his friends did not think his conduct was funny and that his cousin told him to stop acting like an ass. He agreed that he probably said it more than one time but that he did not remember. After his cousin spoke to him he believed he

made the cheese steak remark one more time and the police officer told him to “stop acting like an ass.” He did not recall if he spoke back to the police officer. Askar then said, “He told me to get out of the 7-11. I said ‘I am going to pay for my stuff.’ I went out the door to call my brother to get money. I went back and all of a sudden I am in cuffs.”

Between the time Respondent Muia told him to leave the store and the time he went out the door Askar indicated that he may have asked someone to call his father. When asked why he was having someone call his father he indicated it was because he was being arrested. When it was pointed out to him that this was before he got arrested, Askar said, “I did not say anything.” He acknowledged that if he had just walked out of the store he would not have been arrested.

Askar indicated that he thought he would probably get in trouble if he just left his Slurpee behind.

Askar indicated that he spoke to the store employee Alex after the incident and he knew that there were security cameras in the store. He said that he came beside Respondent Muia about three feet away. He denied that he made a joke about touching his gun. He said he first noticed Respondent Caviness when he was next to Respondent Muia on the opposite side of him and that Respondent Caviness did not speak to him.

On further cross-examination, Askar agreed that he told Respondent Muia to get him a cheese steak sandwich at least two times and that it could have been more. He agreed that he said it a second time to ensure that Respondent Muia heard it. He insisted that it was a joke, but not one on the officer.

After he got the money from his brother, Askar came back in the store. His brother did not come in the store with him. He did not know of any other people in the store, but he did not remember. He indicated that Respondent Muia handcuffed him alone and that his cousin was next to him.

Askar indicated that he was just 13 years old at the time and that today he would not do what he did because he is smarter and learned from the experience.

On re-direct examination, Askar indicated that the maximum number of times he could have made the statement about ordering a cheese steak sandwich was three. He said that he intended his comment to be a joke, "I was young. Everybody thinks that a police officer would accept that as a joke."

On re-cross examination, Askar stated that before he went out of the store the first time, Respondent Muia never told him that he could be placed under arrest.

Wisam Unnab

Unnab indicated that he is 17 years old and that on September 26, 2006 he was 15. He is in the 12th grade at Ft. Hamilton High School and that he lives in Brooklyn with his parents and siblings. Unnab did not recall the time but noted that it was dark out. He and several others went to the 7-11 near his home. Unnab indicated that they knew the employees at the store and got along with them. He stated that he, Hassan and Askar went into the store. The other two, one of whom was Askar's brother, remained outside to smoke cigarettes.

He recalled seeing the two Respondents as well as Alex and another worker inside the store. He did not recall seeing any other civilians "around the neighborhood." Unnab said the two officers were playing Lotto. Both he and Askar "grabbed a Slurpee." Askar

walked up to the counter “and he makes believe he was talking to the mike and said, ‘Can I get a Philly cheese steak and fries.’” Unnab indicated that Askar leaned into his shoulder to “joke around with the cops.”

Unnab said that Respondent Muia turned to Askar and said, “Why are you being a wise ass.” After that, they told Askar to leave. Askar was paying for his Slurpee and the police officers told him if he didn’t leave they were going to handcuff him. Askar said he did not do anything wrong and they handcuffed him and took him outside.

Unnab said the verbal exchange lasted about three minutes. Unnab said he asked the officers why they were arresting Askar and that he had done nothing wrong. He also claims he told them that Askar was 13 years old. Unnab said that Askar was handcuffed inside the store.

Unnab indicated that Askar had made the Philly cheese steak comment and/or a comment about wanting to pay for his stuff three or four times. Unnab indicated that the officers responded by telling Askar that if he did not leave they would handcuff him.

On cross examination, Unnab said that Askar made the “cheese steak” comment once and that he did not repeat himself. Unnab indicated that Hassan was inside the store and was “coming from the refrigerator to pay.” Unnab said it was clear that Askar’s comment was a joke for his friends to hear. He agreed that Askar was told to leave but did not want to leave stating that he was going to pay for his Slurpee.

Unnab indicated that he had discussed the case with an investigator and a lawyer who is representing Askar in a lawsuit. He did not speak with Askar about the case. He acknowledged that he also discussed the case with the Assistant Department Advocate. Unnab could not recall if the police officers used the word “please” when they asked

Askar to leave the store. He indicated that Askar was calm and that the police were yelling.

On further cross-examination, Unnab indicated that he was positive that Askar made the "Philly cheese steak" comment only one time. He indicated that when the incident occurred Respondent Caviness was standing to the right. He further indicated that there were no patrons in the store.

On re-direct examination, Unnab indicated that Askar only got loud after he was taken outside the store and that he heard the "cheese steak" comment because he was two or three feet away from him when it was made.

On re-cross examination, Unnab indicated that after Askar made the "philly cheese steak" comment, the police officer at that point in time reacted immediately.

On questioning by the Court, Unnab indicated that Hassan was going to pay for Askar's drink and that he was in the store.

The Respondents' Case

Each Respondent testified in his own behalf.

Respondent Muia

Respondent Muia became a sergeant on September 1, 2007. He was a police officer in the 68 Precinct starting in October of 2000. On September 26, 2006 he was working a 1500 by 2335 tour. At about 10:00 PM he went to the 7-11 at 8013 Fourth Avenue. He was with Respondent Caviness who was his sergeant at the time. Respondent Muia denied purchasing any scratch-off tickets and he said he was at the counter purchasing coffee. He heard someone say: "Go get me a cheese steak

sandwich.” He heard it a second and a third time. He turned, saw the individual and asked him who he was speaking to. The response was, “I am talking to you. Go order me a cheese steak sandwich.” He asked if the person was alright. The person again said: “Go get me a cheese steak sandwich.”

Respondent Muia said he told the individual, “I think you should pay for your drink and leave,” to which the individual said “I have a right to stay here.”

Respondent Muia said there were two deli workers and a counter clerk in the store and a few other people in the store area. The person making the comments was about an arm’s length away to his left. Respondent Muia did not recall seeing Unnab in the store at the time of the incident.

Respondent Muia said he explained to the individual that if he did not pay for his drink and leave he would be subject to arrest. At that point the individual started cursing, saying, “You can’t arrest me I have a right to be here. . . .Fuck you.” At that time the sergeant came over.

Respondent Muia described the comments about the cheese steak as “loud” and that the loudness escalated.

Respondent Muia stated that Respondent Caviness came to the scene and told the individual he should pay for his item and leave at which point the individual refused and told Respondent Caviness to go fuck himself and that he had no right to arrest him and that he “like[d] to bother cops.”

Respondent Muia further indicated that when the incident started, Respondent Caviness had been further in the store about 15 to 20 feet away.

Respondent Muia stated that at one point the individual challenged him to arrest him, saying “arrest me and go ahead and fucking arrest me.” Respondent Muia said he never wrote a summons to Askar, that he arrested him and did an online report and a complaint report charging him with disorderly conduct. He believed he charged Askar under subsection 2, unreasonable noise.

On cross-examination, Respondent Muia did not recall what he said at the CCRB interview but agreed that the transcript did not indicate that he said Askar was loud during the CCRB interview. He also agreed that he did not indicate that Askar used the word “fuck” at the CCRB interview. He agreed that the transcript of the CCRB interview indicated that he said Askar’s manner was calm and joking but he noted that his answer given that day was not as reflective of what happened as his answers at this trial.

Respondent Muia indicated that when he asked Askar to pay for his items, that is when Askar’s tone was louder than the joking humorous tone he initially had. On questioning by the Court as to why he did not mention the word “fuck” at the CCRB interview, Respondent Muia stated that he did not recall why he did not mention it but that the questions were brief and they moved on to the next question.

Respondent Muia acknowledged that he did not know the subsection of law at the time of the arrest but that while he was processing the paperwork at the station house he learned it was subsection 2. He noted that he considered the louder voice used by Askar to be “unreasonable noise” intended to cause public inconvenience, annoyance or alarm. He acknowledged that no one else in the store spoke to him while this was going on and that the store clerks said nothing to him. Respondent Muia said that he was not upset by Askar’s statement about the cheese steak nor was he upset when he told Askar to leave

the store and he did not. He indicated that he had no statements from people in the store that they were annoyed or alarmed.

Respondent Muia denied that he had threatened to arrest Askar. Rather, he explained to Askar that if he did not pay for his drink and leave he would be subject to arrest and his response was that he was not leaving. Respondent Muia said that he explained the situation to him again and indeed told him three times. He acknowledged that Askar did not come at him. He indicated that he saw approximately three patrons in the store who he thought were alarmed.

Respondent Muia indicated that Askar was in the store with another individual and that he had no contact with that individual or anyone else in the store except Askar. Respondent Muia indicated that he was not aware at the time that Askar was 13 years old and did not know that he was under 16 years of age. Respondent Muia further indicated that he understood it is not illegal to speak disrespectfully to a police officer.

On re-direct examination, Respondent Muia stated that he did not recall all the questions he was asked at the CCRB interview. After reviewing the transcript he acknowledged that he stated that Askar had used the word "fuck" in connection with his arrest. He further recalled that he described Askar tone as loud and cursing. However, on re-cross examination, Respondent Muia acknowledged that that had occurred during and after the arrest and not before.

Respondent Caviness

Respondent Caviness has been employed by the NYPD for 13 and a half years. He became a lieutenant on December 21, 2006. He has made 30 or 40 arrests himself

and been involved in hundreds more. On September 26, 2006, he was a sergeant working a 4:00 to 12:00 tour. He went to the 7-11 to get coffee for the ride home. He entered the store at approximately 2200 hrs. He walked in with Respondent Muia who went to get coffee first. Respondent Muia got his coffee and walked over to the counter at which time he was about 20 feet away. At that time he saw four males walk into the store at a time when three or four other people were in the store besides two store employees.

As he was making his cup of coffee he heard a voice say, "Buy me a cheese steak sandwich." Respondent Caviness said he didn't pay attention to it and then he heard it again a little louder. He turned around and saw Askar pointing a finger at Respondent Muia, saying "Buy me a cheese steak."

He stopped making his coffee and while looking in disbelief he watched to see what Respondent Muia was going to do. He also noticed other people in the store "stop in their tracks and stop their normal actions and paid direct attention to P.O. Muia and the complainant at this time." Respondent Caviness also noticed that Askar had three friends "standing to my left because I am facing one is over by the nacho machine and one is by the Slurpee machine" and they were laughing at the statement Askar was making.

He noted that the third time Askar made the statement his voice continued to rise. After that he heard Respondent Muia tell Askar to make his purchase and leave the store. He said that prior to that Respondent Muia, who was in uniform, told Askar that he was a police officer and that he was not someone for him to play with. Respondent Caviness noted that he too was in uniform.

He indicated: "I sat back and observed the officer's actions. I want to know how he is going to handle the situation. I want to know how he can handle himself at this

time. The complainant says, 'This is a free country. I can say and do what I want.' P.O. Muia says, 'Make your purchase and leave the store.' He says 'I don't have to go anywhere. I could do what I want.'"

Respondent Caviness said that he noticed that people shopping in the store started to put down their goods and leave the area. He said Respondent Muia advised Askar again that he should make his purchase and leave or he would be arrested. Respondent Caviness stated: "At this time, he said 'You can't do anything to me. I can say whatever I want to say.' His friends were laughing. I walk over. Artie (Respondent Muia) grabbed his arm. I grabbed the next arm. We execute the arrest. As we are doing that, his three friends started to approach us...." Respondent Caviness said that at this point he was holding his gun and pushing the three males back. He advised them that Askar was getting a summons for disorderly conduct, that they should call his parents and he would be released to his parents.

Respondent Caviness indicated that Askar, who is 100 pounds heavier than Respondent Muia, dropped his weight and resisted getting in the car. Respondent Caviness told Askar that he was getting a summons and he should not make it worse.

Caviness indicated that he believed Askar's actions rose to being disorderly conduct when he made the third statement. He stated: "The consumers start to put their goods down and changed their course of normal shopping. He started to alarm the consumers from shopping. They were not going on with their everyday business. They put their stuff down, left the store. He was creating public alarm. He was creating disorderly conduct."

He said he believed that Respondent Muia's order for Askar to leave the store was lawful. He indicated that Askar refused a lawful order to disperse.

At some point after he brought Askar to the station house, he returned to the 7-11 and viewed the video tape. On the video tape he saw Askar reach for Respondent Muia's gun. The store attendant pointed it out to Respondent Caviness on the tape. When Askar walked in the store he made a gesture with his hand and turned around and looked at his friend before going to get his Slurpee, in some kind of joking fashion.

On cross-examination Respondent Caviness agreed that he did not see Askar make any motions towards Respondent Muia's firearm prior to seeing the videotape nor did Respondent Muia ever mention it. Respondent Caviness said he was about 15 to 20 feet away and saw Askar pointing his finger at Respondent Muia and telling him to buy him a cheesesteak. After reviewing the minutes of his CCRB interview he agreed that he said he was four or five feet away and he explained the room was small and he didn't have anything to measure against. He said the incident took a minute and a half to two minutes. He said he was watching his police officer interact with the public and that he walked over when the situation escalated. He said Askar was using profane language and that his voice was getting louder and that "he changed the whole perception of everything going on in the store." He said the store workers stood in disbelief. When asked: "By standing there in disbelief after watching that he was creating a public inconvenience or an alarm?" Respondent Caviness responded, "I would say so. They didn't continue to purchase the goods."

Respondent Caviness indicated that Askar was creating a public alarm when he asked Respondent Muia to purchase a cheese steak. Respondent Caviness agreed that

none of the patrons ran out of the store nor did they ask for help but that their facial expressions indicated disbelief. Respondent Caviness was asked:

Question: That violation, there has to be an intention not to create it, but there has got to be actions that follow that?

Answer: There were actions that led up to it. Unreasonable noise, the continuous requests for a cheese steak, pointing down to the police officer, buy me a cheese steak sandwich. This is not a normal action. This is not the way the public interacts with the police. I believe —it doesn't mean—it is when it started to escalate to buy me a cheese steak sandwich, now people are stopping their everyday actions. They are not shopping anymore. They are not buying their goods. They were leaving the location.

He indicated that they left but that they were not running. When asked if they were screaming he said, "No." He was then asked:

Question: Basically, a 13 year old was talking to a police officer?

Answer: I don't know how old he was at the time. At the time, he is huge. We didn't know he was 13.

Question: How old did you think he was?

Answer: When I saw him from the side I thought he was 18 or 19 easily. He is about six feet tall 250 pounds.

Respondent Caviness was not in fear for his safety but he felt that maybe members of the public should have felt in fear for their safety. He denied that the reaction of the members of the public was simply like that of people watching an accident.

Respondent Caviness agreed that being discourteous to a police officer is not disorderly conduct. He denied that he felt Askar was creating public alarm by making unreasonable noise but it was the way in which he was making that unreasonable noise that was creating the alarm. Respondent Caviness stated: "He wasn't just yelling and

screaming or running in this manner. He was yelling and screaming at a police officer in uniform which would create a public alarm. That is not normal activity.” He went on to indicate that Askar did not yell or scream. He said: “His voice was authoritative and continued to escalate. It got higher and higher.” Respondent Caviness agreed that this was part of a command for a cheese steak.

Respondent Caviness also agreed that the failure to obey a lawful order is another part of disorderly conduct. He stated: “He made unreasonable noise and crated public alarm and he disobeyed a lawful order to disburse [sic].” Respondent Caviness indicated that speaking disrespectfully to a police officer does not constitute disorderly conduct and he asserted that Askar was not arrested because he was disrespectful.

Respondent Caviness indicated that the progression of Askar’s cheese steak comments were not annoying to him, but they did alarm him.

Respondent Caviness agreed that Askar did not begin flailing his arms until after Respondent Muia tried to place him under arrest. Respondent Caviness agreed that Askar’s friends were laughing like this was a joke. He further agreed that there was no physical contact between Askar and Respondent Muia until Respondent Muia attempted to arrest him and he indicated that Respondent Muia showed restraint.

On questioning by the Court, Respondent Caviness indicated that the customers left one at a time and that this occurred after the second time Askar made the cheese steak comment.

FINDINGS AND ANALYSIS

This case involves an incident which occurred in a Seven Eleven store in Brooklyn on September 26, 2006 at about 10:00 in the evening. A sergeant, Respondent

Caviness and a police officer, Respondent Muia, while on patrol had stopped to get some coffee. Respondent Muia was at the counter getting ready to pay while Respondent Caviness was further into the store still getting his coffee. Several teenagers arrived at the scene. Some of them remained outside apparently to smoke while three or four, including Askar and Unnab, entered the store. Askar got a Slurpee and went to the counter next to Respondent Muia, a uniformed police officer, and demanded that Respondent Muia buy him a "Philly cheese steak."

While there is no question that Askar made the statement about the "cheese steak" sandwich, there were different versions of how many times he said it and even how he said it. Whether he was arrested when he refused to leave or if he left the store and was arrested when he came back in is another fact that varies in the different versions. There are also disputed facts about how many people were in the store either as employees or customers. Indeed the four witnesses who testified in this case gave four somewhat different versions of what occurred during the few minutes in which this incident took place and it is therefore impossible to say with certainty exactly what happened.

The single specification in this case alleges that the Respondents abused their authority in arresting Askar. The Assistant Department Advocate laid out the theory of the Department's case in her opening remarks. She indicated that there was no probable cause to arrest El-Baraa Askar for disorderly conduct because there was no intent to cause public alarm or disturbance and that Askar did not actually cause public alarm. She asserted that while Askar's actions might be perceived as disrespectful, all it amounted to was "adolescent humor." In her closing argument the Assistant Department Advocate

expanded on this theme by asserting that the Respondents in this case were not acting for the public but for themselves.

Among the most complex areas of law occur at the margin between lawful conduct and conduct which amounts to a minor transgression. Disorderly Conduct is defined in the Penal Law as an offense but it is not a crime and by its own terms, it sits on that oft-debated margin. The fact that an officer may or may not make a correct call is not the measure of misconduct by that officer—the question is whether the decision is reasonable in light of the facts and made in good faith.

As noted the Department Advocate asserted that Askar, a boy of 13, did not intend to cause public inconvenience, annoyance or alarm and that his conduct was an adolescent joke. That may well have been the case but the measure of the Respondents' conduct is what they saw and experienced at the time. While there is some dispute about Askar's size at the time of the incident it is clear that he was very large for his age and it would appear that under even the smallest estimate Askar was larger than Respondent Muia who is short and not heavily built.

Respondent Caviness testified that he thought that Askar was 18 or 19 and given his size and the fact that the encounter occurred at 10:00 PM on a weekday night,¹ his conclusion as to Askar's age does not seem unreasonable.

Considered from that vantage point, a person going over to a uniformed police officer and demanding that he buy a "Philly cheese steak" might well be perceived as conduct intended to cause alarm or even, as the statute provides, conduct which recklessly created a risk of such alarm. This is underscored by the fact that even Askar admits he made the statement two or three times. Such conduct certainly might cause


¹ The Court takes note that September 26, 2006 was a Tuesday night.

customers to decide that the safest thing to do is get away. Further, Askar admits that he did not comply with the order to leave.

Under all of the circumstance, it appears that it was reasonable for the Respondents to have believed that Askar had engaged in conduct which violated Section 240.20 of the Penal Law and that they believed in good faith that they had probable cause to take police action.

Further, there is no evidence that they were engaged in some private use of their police powers. Respondent Muia had a right, no less any other citizen, not to be harassed by Askar. The fact that an officer was the target of such behavior does not make the officer's conduct a personal use of police authority. Their decision to act under the Disorderly Conduct section, whatever the outcome of that case, seems to be within the bounds of reasonable conduct on their part. The Respondents are found not guilty.

Respectfully submitted,


Martin G. Karopkin
Deputy Commissioner – Trials

APPROVED

MAY 26 2009
RAYMOND W. KELLY
POLICE COMMISSIONER